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No. 07-1408

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIE R. BROWN,

Petitioner,

vs.

SCOTT FISHER, J.J. WEBER, and
COUNTY OF MIAMI, KANSAS,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Brown's arrest was reasonable under the Fourth Amendment.

2. Even assuming a Fourth Amendment violation, qualified immunity applies because the law applicable to this case was not clearly established in Brown's favor.

3. The dismissal of Miami County without prejudice is not an appealable order. The Tenth Circuit properly dismissed this portion of Brown's appeal for lack of jurisdiction. Even so, the district court's dismissal of the claims against Miami County was proper.

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STATEMENT OF THE CASE

Brown's recitation of the facts is incomplete and peppered with irrelevant commentary. Respondent Scott Fisher, a Miami County deputy sheriff, provides a short statement of pertinent facts below for the Court's convenience.

On February 25, 2004, Brown was driving a pickup truck with a teenage passenger. Brown noticed a sheriff's vehicle behind him when its emergency lights were activated. Brown pulled to the side of the road.

Fisher approached the driver's side window and asked to see Brown's driver's license. Brown did not produce the driver's license. Instead, he asked Fisher if he had probable cause for the stop. Fisher responded that Brown had a headlight out. Brown does not dispute that he was driving with a headlight out.

Fisher asked again to see Brown's driver's license. Brown asked if he were under arrest. Fisher advised Brown he was not, but said that he was going to give Brown a third opportunity to show his driver's license, and if he failed to do so he would be arrested. There is no support in the record for Brown's assertion that Fisher "became irritated" when Brown refused to produce his license. Rather, Brown admitted that Fisher was polite throughout the exchange.

Brown did not produce his driver's license. Fisher returned to his patrol car. As Fisher walked

back to his patrol car, Brown got out of the truck to look behind his seat for his driver's license. Fisher turned and ordered Brown back into his car. Brown complied.

When Fisher returned to Brown's vehicle, Brown was looking through his briefcase to find his driver's license. Fisher told Brown he was under arrest and directed him to get out of the vehicle.

Brown exited his vehicle. Fisher patted him down and handcuffed him. Fisher escorted Brown to the patrol car and placed him inside. Brown has no complaint about the method of handcuffing or the placement in the patrol car.

Fisher returned to Brown's vehicle, got the passenger out of the vehicle, and patted down the passenger. Fisher then went to the driver's side, got in the vehicle, and returned to the patrol car with Brown's billfold which had been left in his open briefcase. Fisher opened the billfold in Brown's presence and located his driver's license in a pocket of the billfold.

Brown was detained at the scene of the traffic stop for about 35 minutes. He does not complain that he was physically mistreated or verbally abused during the detention.

Fisher transported Brown to the Miami County Jail. Brown refused to post a $35 bond. Staff processed Brown into the jail. While Brown was still in the

booking room, Trooper J. J. Weber arrived and handed Fisher an empty open nonalcoholic beer can taken from Brown's vehicle.

Brown was booked into the jail at 10:30 p.m. He was released the next morning at 7:30 a.m. by Undersheriff Mark Schmidt. While in jail, he was given a citation for driving with an open alcoholic beverage container and for failing to display his driver's license on demand.

Brown sued Weber, Fisher and Miami County under 42 U.S.C. § 1983 for violations of his Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights. The district court determined the claims implicated only the Fourth Amendment. The district court granted summary judgment to Weber and Fisher and dismissed the claims against Miami County without prejudice for lack of proper service.

Brown appealed. The Tenth Circuit reversed the grant of summary judgment against Weber, dismissed the appeal regarding Miami County for lack of jurisdiction, and affirmed all other decisions of the district court. Brown filed a petition for writ of certiorari with this Court seeking review of the grant of summary judgment to Fisher and the dismissal of Miami County.

REASONS FOR DENYING THE WRIT

1. Brown's arrest was reasonable under the Fourth Amendment.

An officer may arrest a person if the officer has probable cause to believe the person has committed "even a very minor criminal offense in his presence." *Atwater v. City of Lago Vista,* 532 U.S. 318, 354 (2001). Here, Brown committed two offenses in Fisher's presence: 1) driving with an inoperable headlight after dark; and 2) failing to produce a driver's license on demand.

Brown does not dispute that Fisher had probable cause to believe he was driving with an inoperable headlight. This is a minor offense, but an offense nonetheless. See K.S.A. 8-1728(a) (requiring two lighted headlights); and K.S.A. 8-1703(a)(1) (requiring display of headlights after sunset). A traffic infraction is specifically included in the definition of a crime. See K.S.A. 21-3105; and *City of Prairie Village v. Eddy,* 14 Kan.App.2d 661, 662, 798 P.2d 66 (1990).

Brown argues that the violation did not supply probable cause for his arrest because it was not an arrestable offense under Kansas law. See K.S.A. 22-2401(d) (officer may arrest for any crime except a traffic or cigarette infraction); K.S.A. 8-2118(c) (K.S.A. 8-1728(a) and 8-1703(a)(1) listed as traffic infractions).

Whether state law allows an arrest for a particular offense is irrelevant to a Section 1983 claim.

Apodaca v. City of Albequerque, 443 F.3d 1286, 1289 n. 2 (10th Cir. 2006). See also *Davis v. Scherer,* 468 U.S. 183, 194-96 (1984) (a violation of state law does not give rise to a claim under Section 1983); *Wilder v. Turner,* 490 F.3d 810, 814 (same); *United States v. Mikulski,* 317 F.3d 1228, 1232 (10th Cir. 2003) ("officers' violation of state law is not, without more, necessarily a federal constitutional violation"); and *United States v. Green,* 178 F.3d 1099, 1105 (10th Cir. 1999) (fact that arrest violated state law does not mean evidence should be suppressed under Fourth Amendment).

Warrantless arrests for "fine-only" offenses or traffic infractions do not necessarily run afoul of the Fourth Amendment. *Atwater,* 532 U.S. at 349-50. See also *United States v. Herbin,* 343 F.3d 807, 810 (6th Cir. 2003) (Fourth Amendment does not prohibit custodial arrest for traffic violation even though not an arrestable offense under state law); *United States v. Bell,* 54 F.3d 502 (8th Cir. 1995) (a federal court does not look to state statutes to determine the validity of an arrest); and *United States v. Laville,* 480 F.3d 187, 191 (3rd Cir. 2007) (reasonableness of arrest does not depend on whether it was authorized by state law).

Brown argues that his arrest for a "fine-only" offense gives rise to a Fourth Amendment violation. Without more, Brown's argument fails. *Atwater, Apodaca* and other Tenth Circuit precedent dictate that Brown's arrest was reasonable under the Fourth Amendment.

The analysis of Brown's claim hinges in large part upon *Atwater,* a case decided by the United States Supreme Court in 2001. Atwater was arrested after a traffic stop for failure to wear her seatbelt and to secure her children with seatbelts. Under Texas law it was an offense punishable only by a fine. After stopping Atwater, the officer berated her, handcuffed her and put her in his patrol car. He drove her to the police station, where she was required to remove her shoes, jewelry, and eyeglasses, and empty her pockets. Officers took her "mug shot" and placed her in a jail cell. She was released on bond. She later pled no contest and paid a $50 fine. 532 U.S. at 324.

Atwater argued that her Fourth Amendment rights were violated because she was arrested without a warrant for a fine-only offense. The Supreme Court affirmed summary judgment for defendants, reasoning that an arrest survives Fourth Amendment scrutiny if supported by probable cause to believe an offense has been committed and if effected in a reasonable manner. 532 U.S. at 354.

The Tenth Circuit and Kansas district courts have cited and followed *Atwater* without pause in a variety of contexts.

For example, in *Tanberg v. Sholtis,* 401 F.3d 1151, 1157 (10th Cir. 2005), the Tenth Circuit relied on *Atwater* in evaluating the arrest of a person who remained in a public park after closing time. The Tenth Circuit concluded the arrest was reasonable because the officer had probable cause to believe that the person was violating a city ordinance prohibiting

use of public parks during certain hours of the night. See also *Biehl v. Salina Police Dept.*, 2007 WL 2099911 (D.Kan. 2007) (citing *Atwater* for the proposition that "[w]ith probable cause, an officer may arrest an individual for even a very minor criminal offense, if the offense is committed in the officer's presence."); *Wilder v. Turner*, 490 F.3d 810 (10th Cir. 2007) (same); *Bochove v. Village of Corrales*, 2006 WL 1531094 (10th Cir. 2006) (same); *Apodaca*, 443 F.3d 1286 (same); *Teets v. Board of County Com'rs of Osage County, Kansas*, 2003 WL 1565936 (D.Kan. 2003) (cited in upholding arrest for suspected violation of restraining order); *Rucker v. Hampton*, 2002 WL 31341532 (10th Cir. 2002) (noting *Atwater's* holding that "the Constitution tolerates full custodial arrests for fine-only offenses").

Brown argues that *Atwater* is distinguishable because the offense at issue there was statutorily defined as an arrestable offense. Brown uses the same logic to attempt to distinguish *Apodaca*, but there the plaintiff's arrest was upheld based on probable cause to believe that she committed a number of crimes, some arrestable offenses and some not. The Tenth Circuit in *Apodaca* specifically stated that probable cause sufficient to arrest need not be attached to an arrestable offense, but may be attached to any offense at all. 443 F.3d at 1289, fn. 2.

Here, Brown's arrest was supported by probable cause to believe he had committed a traffic infraction. Brown does not dispute that he was driving with an inoperable headlight. Further, Brown does not complain of the manner of his arrest. Thus, Brown's

arrest is reasonable and does not violate the Fourth Amendment.

In addition, the district court concluded that Fisher had probable cause to arrest Brown for failing to display his driver's license upon demand. This is a violation of state law. See K.S.A. 8-244. It is also an arrestable offense. See K.S.A. 22-2401(d) (may arrest for any crime except a traffic or cigarette infraction); K.S.A. 8-2118(c) (violation of K.S.A. 8-244 not listed as a traffic infraction).

The Tenth Circuit correctly concluded that Brown's arrest was supported by probable cause to believe Brown was driving with an inoperable headlight. Brown's arrest was also supported by probable cause to believe Brown did not display his license on demand. Though the Tenth Circuit did not agree with the latter basis for probable cause, this remains an alternative ground for affirming the judgment of the district court and the Tenth Circuit. It may be considered and adopted by the Court as an additional reason to deny the writ. *Thigpen v. Roberts,* 468 U.S. 27, 30 (1984) (this Court "may affirm on any ground that the law and the record permit and that will not expand the relief granted below").

2. **Even assuming a Fourth Amendment violation, qualified immunity applies because the law applicable to this case was not clearly established in Brown's favor.**

Even assuming a Fourth Amendment violation, which respondent vigorously denies, qualified

immunity still applies because the law applicable to this situation was not clearly established in Brown's favor at the time of his arrest.

Once the defense of qualified immunity has been raised, it is plaintiff's burden to prove clearly established law in his favor. *Novitsky v. City of Aurora,* 491 F.3d 1244, 1255 (10th Cir. 2007). Brown must prove the right was sufficiently clear that a reasonable official would have understood that his conduct violated the right. "'Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.'" *Currier v. Doran,* 242 F.3d 905, 923 (10th Cir. 2001).

Brown does not and cannot make such a showing here. There was and is no clearly established law which dictates that Brown's constitutional rights were violated by an otherwise reasonable arrest for a fine-only offense. *Atwater, Apodaca* and other Tenth Circuit precedent cited above establish the opposite – that Brown's arrest was reasonable as a matter of law.

Judge Henry, who wrote the concurring opinion in the Tenth Circuit, acknowledged that *Apodaca* supports affirming the district court on this issue. Even if *Atwater* may be distinguished because it involved an arrestable offense, Judge Henry agreed with the majority that the question is close enough to entitle Fisher to qualified immunity.

There was no constitutional violation here. Even if there was, there was no violation of a clearly established right. Applicable law was not and is not clearly established in Brown's favor. If anything, it leans heavily in favor of respondent. For these reasons, qualified immunity applies.

3. **The dismissal of Miami County without prejudice is not an appealable order. The Tenth Circuit properly dismissed this portion of Brown's appeal for lack of jurisdiction. Even so, the district court's dismissal of the claims against Miami County was proper.**

Brown does not address the Tenth Circuit's lack of jurisdiction over the dismissal of Miami County without prejudice. Instead, he attacks the substance of the district court's decision to dismiss Miami County.

Brown sued Fisher, J.J. Weber and Miami County. When attempting to serve Miami County, Brown served process upon an employee of the Clerk of the District Court of Miami County and filed a proof of service to that effect. He did not serve the Miami County Clerk, the Miami County Treasurer or any member of the governing body of Miami County as required by Fed.R.Civ.Pro. 4(j)(2) and K.S.A. 60-304(d)(1).

The district court dismissed Brown's claims against Miami County without prejudice because he failed to effect proper service within 120 days of filing

his complaint. See Fed.R.Civ.Pro 4(m). The district court also observed that Brown failed to allege that Miami County violated his rights through a custom, practice or policy or through the act of a final decision-maker, an element necessary to his claim against Miami County.

Brown challenged the dismissal on appeal to the Tenth Circuit. The Tenth Circuit concluded that it did not have jurisdiction to consider the issue because the dismissal was not a final order. The Tenth Circuit reasoned that the district court's order would have allowed Brown to re-file his case and properly serve Miami County.

Brown ignores the jurisdictional issue in his petition. This is reason enough to deny review of the matter.

Only final decisions of the district court may be appealed. 28 U.S.C. §1291. A dismissal without prejudice is "usually not" a final appealable order. *Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1275 (10th Cir. 2001). "In this circuit, whether an order of dismissal is appealable generally depends on whether the district court dismissed the *complaint* or the *action*." *Moya v. Schollenbarger*, 465 F.3d 444, 449 (10th Cir. 2006) (emphasis original).

The district court dismissed the claims against Miami County without prejudice and provided a broad hint to Brown that any re-filed claim against the County should include an allegation of *Monell* liability. In its order, the district court did not dismiss the

entire action nor did it close the doors to the courthouse to Brown's claim against the County. "If it is clear that plaintiff may not start over again with a properly drawn complaint, because of limitations problems or otherwise, the action is treated as final and the order is appealable." *Bragg v. Reed,* 592 F.2d 1136, 1138 (10th Cir. 1979). Here, nothing prevented Brown from refiling a properly drawn complaint against Miami County and effecting proper service. See K.S.A. 60-518 (allowing an action timely filed and dismissed other than on the merits to be filed anew within six months of dismissal).

The district court's dismissal without prejudice was not a final, appealable order. This Court, like the Tenth Circuit, does not have jurisdiction to consider a challenge to dismissal of the claims against Miami County.

Even so, Brown's substantive attack on the dismissal fails. He argues that he obtained proper service on Miami County because the Clerk of the District Court gave the summons to County Attorney David Hager, and this constituted proper service under Fed.R.Civ.Pro. 4(h)(1). Rule 4(h)(1) addresses service of process upon a corporation, partnership or association through an officer or agent. It does not apply to service upon a municipality. In any event, Hager was never served. He simply received the summons from the Clerk of the District Court, who was served.

The district court correctly dismissed the claims against Miami County because Brown did not obtain proper service of process on the County.

On a final note, any claim against Miami County ultimately fails on the merits because its employee, Fisher, did not violate Brown's constitutional rights. The County cannot be held liable where there is no underlying constitutional violation. *Butler v. City of Prairie Village, Kansas,* 172 F.3d 736, 747 (10th Cir. 1999).

CONCLUSION

For the reasons outlined above, Brown's petition for writ of certiorari should be denied.

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